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In the Supreme Court of the United States

OCTOBER TERM, 1960

No.

CHRISTIAN A. HERTER, SECRETARY OF STATE, APPELLANT

v.

JOSEPH HENRY CORT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge District Court holding Section 349(a)(10) of the Immigration and Nationality Act of 1952 unconstitutional is set forth in the Appendix, *infra*, pp. 10–18.

JURISDICTION

The judgment of the District Court holding Section 349(a)(10) of the Immigration and Nationality Act of 1952 unconstitutional, declaring appellee to be a citizen of the United States and enjoining the Secretary of State from denying him a passport on the ground that he had been expatriated, was entered on October 25, 1960. Appendix, *infra*, pp. 19–20. A notice of appeal to this Court was filed in the District

Court on October 27, 1960.[1] The jurisdiction of this Court to review on direct appeal the judgment of a three-judge District Court enjoining the enforcement of an Act of Congress is conferred by 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction of an action for a declaratory judgment of United States nationality and injunctive relief brought by a person residing abroad who claims that he has been denied a right as a United States national, or whether the exclusive remedy in such a case is that provided by Section 360 (b) and (c) of the Immigration and Nationality Act of 1952.

2. Whether Congress has the constitutional power to provide, as it did in Section 349(a)(10) of the Immigration and Nationality Act of 1952, for the expatriation of a native-born citizen who, in time of national emergency, remained outside the jurisdiction of the United States for the purpose of evading or avoiding service in the armed forces of the United States.

STATUTES INVOLVED

The Immigration and Nationality Act of 1952, 66 Stat. 163, provides in pertinent part:

> SECTION 349(a)(10), 66 Stat. 267–268:
>
> (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

[1] An amended notice of appeal to correct the date given as the entry of the judgment of the district court was filed on November 1, 1960.

(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

SECTION 360 (b) and (c), 66 Stat. 273–274:

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Sec-

retary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

STATEMENT

Appellee, who had been born in the United States and was residing abroad, was denied a passport to return to this country by the Department of State following its determination that he had lost his citizenship under Section 349(a)(10) of the Immigration

and Nationality Act of 1952, *supra*, pp. 2–3, by remaining outside the United States during a period of national emergency to avoid service in the armed forces of the United States. He filed suit against the Secretary of State in the District Court for the District of Columbia seeking declaratory and injunctive relief. In the complaint he alleged that he had not remained abroad to evade his military obligation and that Section 349(a)(10) was unconstitutional. The Secretary of State, by motion to dismiss, and in his answer, asserted *inter alia* that the District Court was without jurisdiction to entertain the declaratory judgment action because Section 360 (b) and (c) of the Immigration and Nationality Act of 1952, *supra*, pp. 3–4, provided the exclusive remedy for one residing abroad who claimed a denial of citizenship rights, and also that Section 349(a)(10) was constitutional.

Both parties moved for summary judgment before a three-judge District Court convened under 28 U.S.C. 2282, 2284. The court (on October 11, 1960) filed an opinion granting appellee's motion, and holding (1) that the government had shown by clear, convincing, and unequivocal evidence that appellee had remained abroad to evade his military obligation; (2) that the court had jurisdiction of the declaratory judgment action; and (3) that Section 349(a)(10) was unconstitutional (Appendix, *infra*, pp. 10–18).

THE QUESTIONS ARE SUBSTANTIAL

Two questions are posed on this appeal—the jurisdiction of the District Court and the constitutionality of the denationalization statute. Both are manifestly substantial and call for resolution by this Court.

1. The substantiality of the constitutional issue as to the power of Congress to provide for loss of nationality for departing from or remaining outside this country in order to evade military service requires no elaboration. This was the issue upon which this Court noted probable jurisdiction in *Mackey* v. *Mendoza-Martinez,* in the October Term, 1958 (359 U.S. 933), dealing with the validity of Section 401(j) of the Nationality Act of 1940, as amended, the direct predecessor of Section 349(a)(10) of the 1952 Act.[2] While the Court did not reach the question of the validity of Section 401(j), remanding that case after argument to the District Court to resolve an issue of collateral estoppel (362 U.S. 384), the District Court, on remand, found the doctrine of collateral estoppel inapplicable and adhered to its former decision that Section 401(j) is unconstitutional. The government has noted an appeal from that judgment, and the jurisdictional statement in that case is being filed simultaneously with this one. The considerations supporting the constitutionality of the statute are discussed in the government's brief on the merits in *Mendoza-Martinez,* at the last term (No. 29, O.T. 1959).

2. The jurisdictional issue is also important since it deals with the recurring problem of what procedures are available to persons residing abroad claiming

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[2] The Court had twice previously granted certiorari on this issue (among others) for a hearing on the merits (*Gonzales* v. *Landon*, 349 U.S. 943, 350 U.S. 920; *Perez* v. *Brownell*, 352 U.S. 908, 356 U.S. 44). The Court has four times heard argument on the validity of Section 401(j).

rights of American citizenship. The District Court's conclusion that Section 360 (b) and (c) of the Immigration and Nationality Act of 1952, *supra*, pp. 3–4, do not provide the exclusive remedy for persons outside the United States asserting a claim of citizenship is, we believe, contrary to the intent of Congress.

Section 503 of the Nationality Act of 1940, the predecessor of Section 360, had provided that any person (within or without the United States) claiming a denial of citizenship rights could institute, in the District Court for the District of Columbia or the district in which he claimed permanent residence, an action for a judgment declaring him to be a national of the United States. One instituting the suit from outside the United States could obtain from a United States diplomatic or consular officer a certificate of identity and be admitted to the United States on the condition that he would be subject to deportation if it was decided that he was not a national. Section 360(a) of the 1952 Act continued, with certain exceptions, the right of a person who is *within* the United States to maintain such a declaratory judgment action under the Declaratory Judgment Act (28 U.S.C. 2201) in order to determine nationality status. The Senate Judiciary Committee, after investigation, concluded that "section 503 * * * ha[d] been used, in a considerable number of cases, to gain entry into the United States where no such right existed". S. Rept. No. 1515, 81st Cong., 2d Sess., p. 777. Congress therefore decided to withhold this remedy from those residing abroad. It restricted the remedy of declaratory relief to those who were within the United States. *Id.*

at 810. A different exclusive remedy available to those not residing in the United States was provided for in Section 360 (b) and (c). As described in the Senate Report accompanying the 1952 Act (S. Rept. No. 1137, 82d Cong., 2d Sess., p. 50):

> The bill * * * provides that any person who has been physically present in the United States but who is not within the United States who claims a right or privilege as a national of the United States and is denied such right or privilege by any government agency may be issued a certificate of identity for the purpose of traveling to the United States and applying for admission to the United States. *The net effect of this provision is to require that the determination of the nationality of such person shall be made in accordance with the normal immigration procedures. These procedures include review by habeas corpus proceedings where the issue of the nationality status of the person can be properly adjudicated.* [Emphasis added.]

See, similarly, H. Rept. No. 1365, 82d Cong., 2d Sess., p. 87.

It would seem, therefore, that, by Section 360 (b) and (c) of the 1952 Act, Congress intended to prevent persons residing abroad who claim a denial of citizenship rights from seeking relief by way of a declaratory judgment suit, and instead relegated them to the procedures outlined in Section 360 (b) and (c). This was the position adopted in *Sato* v. *Dulles,* 183 F. Supp. 306 (D. Haw.), affirmed by the Court of Appeals for the Ninth Circuit on May 5, 1960, No. 16279. See also *D'Argento* v. *Dulles,* 113 F. Supp. 933 (D.D. C.); but cf. *Tom Mung Ngow* v. *Dulles,* 122 F. Supp. 709 (D.D.C.)

CONCLUSION

It is therefore respectfully submitted that the Court should note jurisdiction of this appeal.

J. LEE RANKIN,
Solicitor General.
MALCOLM RICHARD WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

DECEMBER 1960.

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 868-60

JOSEPH HENRY CORT, PLAINTIFF

v.

CHRISTIAN A. HERTER, SECRETARY OF STATE, DEFENDANT

Opinion

Before EDGERTON, Circuit Judge, and TAMM and MATTHEWS, District Judges

MATTHEWS, *District Judge:* The plaintiff, a citizen of the United States by birth, has been declared to have lost his American citizenship by reason of remaining outside the United States for the purpose of avoiding training and service in the armed forces of this country. He has been refused a passport on which to return from abroad. He denies the purpose attributed to him and also challenges the validity of the law under which his loss of citizenship was declared. This law, Section 349(a)(10) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267-268, 8 U.S.C. 1481(a)(10),[1] provides:

> (a) * * * a person who is a national of the United States whether by birth or naturalization, shall lost his nationality by:
>
> * * * * * *
>
> (10) departing from or remaining outside of the jurisdiction of the United States in time

[1] Section 401 of the Nationality Act of 1940, 54 Stat. 1168, was amended in 1944 by adding a subsection (j), 58 Stat. 746. Section 401(j) was reenacted in the Immigration and Nationality Act of 1952 in Section 349(a)(10).

> of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

The plaintiff was born in Boston, Massachusetts, on December 27, 1927. He is a physician and research physiologist. In May 1951, he departed from the United States for temporary work in England. His draft board in Brookline, Massachusetts, ordered him to report in September 1953 for induction into the armed forces of the United States but he did not appear and thereafter was indicted on the charge of having failed to comply with the order. At the instance of the United States the British Government refused to renew the plaintiff's residence permit. Instead of returning to the United States he traveled to Czechoslovakia where he was and is employed. In 1959 he applied for a United States passport to enable him to return to this country. The Passport Office of the Department of State made an administrative decision that the plaintiff had expatriated himself by remaining outside the United States for the purpose of avoiding service in the armed forces and refused him a passport. Early in 1960 the Department's Board of Review on the Loss of Nationality affirmed the decision of the Passport Office.

Shortly thereafter plaintiff brought this suit for a judgment declaring him to be a citizen of the United States. He seeks an interlocutory and permanent injunction to restrain the enforcement and execution

of the challenged provision of law. He contends that Congress is without power to attach loss of citizenship as a consequence of avoiding service in the armed forces by remaining abroad. He also argues that such an exercise of power would violate the Due Process Clause of the Fifth Amendment to the United States Constitution as well as the prohibition against cruel and unusual punishments in the Eighth Amendment. On the plaintiff's application this three-judge statutory court has been convened to hear and determine the case.[2]

A motion for summary judgment has been filed by the plaintiff and also by the Government. In addition the Government has moved to dismiss the action, asserting that the plaintiff has failed to pursue his exclusive remedy for obtaining a review of his citizenship status. This exclusive remedy, according to defendant, is provided by Section 360 (b) and (c) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 273–274, 8 U.S.C. 1503 (b) and (c).

We will first give consideration to the ground advanced in support of the motion to dismiss. It is provided in subdivision (b) of Section 360 that any person who is not within the United States and who is denied a right or privilege upon the ground that he is not a national of the United States may make application to a diplomatic or consular officer for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for

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[2] 28 U.S.C. 2282 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

admission. Subdivision (c) of that section provides that if such person is granted and in possession of a certificate of identity he may then apply for admission to the United States at any port of entry, and if it is finally determined by the Attorney General that such person is not entitled to admission then such determination is subject to review by any court of competent jurisdiction "in habeas corpus proceedings and not otherwise."

Section 360 may well be thought to provide an exclusive remedy for a person outside of the United States who has sought and obtained a certificate of identity and who has applied for admission to the United States at a port of entry. But we need not determine that question. The language of the section shows no intention to provide an exclusive remedy, or any remedy, for persons outside the United States who have not adopted the procedures outlined in subsections (b) and (c). Neither does the section indicate that such persons are to be denied existing remedies. The legislative history of the section does not require such a construction. *Cf. Frank* v. *Rogers*, 102 U.S. App. D.C. 367, 253 F. 2d 889; *Tom Mung Ngow* v. *Dulles*, 122 F. Supp. 709 (D.C. D.C.). Subsections (b) and (c) were designed to regulate, not to require, the use of certificates of identity.

While the plaintiff might have applied for a certificate of identity for the purpose of following the procedure set forth in Section 360, there is nothing in this case to indicate that he ever did or that such a certificate has been issued to him. Instead, he has chosen to bring this action under the Declaratory Judgment Act for a judgment declaring him to be a United States citizen.

We hold that the complaint in this case presents a controversy to which the judicial power extended

under the Constitution, and that authority to hear and determine it has been conferred upon the District Court by the Declaratory Judgment Act and the Administrative Procedure Act.[3] *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 239–241, 244; *Perkins* v. *Elg*, 69 App. D.C. 175, 99 F. 2d 408, affirmed 307 U.S. 325; *Tom Mung Ngow* v. *Dulles*, supra; *Frank* v. *Rogers*, supra. The motion to dismiss is denied.

When, as here, a citizenship claimant establishes his birth in the United States the burden is upon the Government to prove by clear, convincing and unequivocal evidence the act it relies upon to show expatriation. *Nishikawa* v. *Dulles*, 356 U.S. 129, 133. We think the Government has met this burden. In 1951 when the plaintiff went abroad it was for a limited period. On December 29, 1952, he accepted a position at the Harvard Medical School to begin the latter part of 1953, and indicated that he had made arrangements for prior transportation to the United States. His intention to return to this country was steadfast until he learned shortly after January 31, 1953, that the school authorities felt that they could not declare him "essential" for teaching, and that he probably would be drafted. He wrote them on February 10, 1953, that until he heard "something definite" from the draft board he was "reluctant to take a decision that may prove to be foolish or premature." On February 9, June 4, and July 3 in 1953 the draft board sent him notices to report for physical examination, and thereafter ordered him to report for induction on September 14, 1953. The plaintiff made no response or compliance but remained abroad. We are convinced that his purpose was to avoid service in the armed forces.

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[3] Declaratory Judgment Act of June 14, 1934, 48 Stat. 955, as amended, 28 U.S.C. 2201. Administrative Procedure Act of June 11, 1946, 60 Stat. 237, as amended, 5 U.S.C. 1001.

The only question left in this case is the constitutionality of the law under which the Government maintains that the plaintiff was divested of his citizenship.

At the threshold of this issue we are faced with the decision of the Supreme Court in *Trop* v. *Dulles*, 356 U.S. 86. There Trop, the plaintiff, had been a private in the United States Army, serving in French Morocco. A general court-martial had convicted him of desertion and sentenced him to three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge. Some years after his return to the United States he applied for a passport. It was denied on the ground that by reason of his conviction and dishonorable discharge for wartime desertion he had lost his citizenship under the provisions of Section 401(g) of the Nationality Act of 1940, as amended.[4] Trop sued for a judgment declaring him

[4] 54 Stat. 1168, 1169, as amended, 58 Stat. 4, 8 U.S.C. 1481(a)(8):

"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

* * * * *

"(g) deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces: *Provided*, That, notwithstanding loss of nationality or citizenship or civil or political rights under the terms of this or previous Acts by reason of desertion committed in time of war, restoration to active duty with such military or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military or naval authority, prior or subsequent to the effective date of this Act, shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom. * * *"

to be a citizen. The issue was whether his expatriation for desertion in war time comported with the Constitution. The Government's motion for summary judgment was granted and the Court of Appeals for the Second Circuit affirmed. But the Supreme Court reversed, holding Section 401(g) unconstitutional, Mr. Justice Frankfurter, Mr. Justice Burton, Mr. Justice Clark and Mr. Justice Harlan dissenting.

The concept of the Chief Justice's opinion in *Trop*, in which three of his colleagues concurred, is that the purpose of Section 401(g) is "punishment" of a convicted deserter and hence, that "the statute is a penal law", P. 97, and that even if "it is assumed that the power of Congress extends to divestment of citizenship" the use of such divestment as punishment is barred by the Eighth Amendment's prohibition against cruel and unusual punishment. Pp. 99, 101. A fifth member of the Court, Mr. Justice Brennan, agreed that Section 401(g) is beyond the power of Congress, but on the ground that "the requisite rational relation between this statute and the war power does not appear * * *." P. 114. The rationale of the dissenting opinion in *Trop* is that "Congress was calling upon its war powers when it made such desertion an act of expatriation", P. 121, that expatriation under the Nationality Act is not "punishment", in any valid constitutional sense, that "because denationalization was attached by Congress as a consequence of conduct that it had elsewhere made unlawful, it does not follow that denationalization is a 'punishment' any more than it can be said that loss of civil rights as a result of conviction for a felony * * * is a 'punishment' for any legally significant pur-

poses", P. 124, and that the legislation "is the result of an exercise by Congress of the legislative power vested in it by the Constitution * * *," P. 128.

While the provision involved in *Trop* and the provision here in question are not the same, the Chief Justice pointed out that they are "essentially" alike. P. 93. The former decrees that conviction and dishonorable discharge for desertion in war time give rise to loss of citizenship. The latter decrees such loss for departing from or remaining outside the United States to avoid service in the armed forces during war time or a period of national emergency. The principal opinion in *Trop* comments at pages 93–94 on Section 401(j)—the provision involved here but now known as Section 349(a)(10)—as follows:

> This provision was also before the Court in *Perez*, but the majority declined to consider its validity. While section 401(j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401(g), the provision in this case, accords the accused deserter at least the safeguards of an adjudication of guilt by a court-martial.[5]

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[5] In *Perez* v. *Brownell*, 356 U.S. 44, the petitioner had been declared to have lost his citizenship under Section 401(e) as well as under Section 401(j) of the Nationality Act of 1940. He claimed that both of the sections were unconstitutional. The Supreme Court held in its majority opinion that Section 401(e), which provided for loss of nationality by voting in a foreign election, was constitutional as a reasonable exercise of the power of Congress to deal with foreign affairs. In view of this holding, the Supreme Court did not find it necessary to consider also the constitutionality of Section 401(j).

We perceive no substantial difference between the constitutional issue in the *Trop* case and the one facing us.* The Court's ruling there is controlling here. Otherwise, Judge Tamm and I, for reasons expressed in the dissenting opinion, would uphold the validity of the provision under which the plaintiff was declared to have lost his citizenship. We all conclude that subdivision 10 of Section 349(a) of the Immigration and Nationality Act of 1952 is unconstitutional.

Accordingly the motion of the plaintiff for summary judgment is granted and that of the defendant is denied.

/s/ HENRY W. EDGERTON,
United States Circuit Judge.

/s/ EDWARD A. TAMM,
United States District Judge.

/s/ BURNITA SHELTON MATTHEWS,
United States District Judge.

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* In the case of *Mendoza-Martinez* v. *Mackey*, 9 Cir., 238 F. 2d 239, the Court of Appeals affirmed a decision of the District Court upholding the constitutionality of Section 401(j). The Supreme Court granted certiorari and remanded the cause to the District Court, 356 U.S. 258, for reconsideration in the light of *Trop*. On remand the District Court held that Section 401(j) is unconstitutional. Direct appeal was then made to the Supreme Court which noted probable jurisdiction, 359 U.S. 933, and again remanded to the District Court on a collateral issue unrelated to the constitutional question. *Mackey* v. *Mendoza-Martinez*, 362 U.S. 384.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 868–60

JOSEPH HENRY CORT, PLAINTIFF

v.

CHRISTIAN A. HERTER, SECRETARY OF STATE, DEFENDANT

Judgment

This case having come before the Court on cross-motions for summary judgment, and the Court having considered the evidence and memoranda filed by the parties and having heard counsel in open court, and finding that there is no material issue of fact and that the plaintiff is entitled to summary judgment as set forth in the opinion of this Court of October 11, 1960, it is by the Court this 25th day of October, 1960,

ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff, Joseph Henry Cort, is declared to be, and to have been since his birth, a citizen of the United States of America and to be entitled to all the rights and privileges of a citizen of the United States.

2. That the statute, Section 349(a)(10) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267–268, 8 U.S.C. 1481(a)(10), is unconstitutional.

3. That the certificate of loss of nationality issued by the defendant to the plaintiff on the ground that the plaintiff has expatriated himself and the de-

fendant's decision to that effect are hereby declared to be null and void.

4. That the defendant, Christian A. Herter, Secretary of State, his officers, servants, employees, and attorneys, and all persons in active concert or participation with them be, and they hereby are, enjoined from withholding from the plaintiff a United States passport on the ground that he is not a citizen, or otherwise denying him any of the rights and privileges of a citizen of the United States, on the ground that he is not a citizen.

HENRY W. EDGERTON,
United States Circuit Judge.

EDWARD A. TAMM,
United States District Judge.

BURNITA SHELTON MATTHEWS,
United States District Judge.

No objection as to form:

HAROLD D. RHYNEDANCE, Jr.,
Assistant United States Attorney.